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***CONSTITUTIONAL ASSEMBLY***

***THEME COMMITTEE ONE  
CHARACTER OF  
DEMOCRATIC STATE***

***BLOCK 9: BRIEFING DOCUMENT***

***AGENDA ITEM 12:  
NATIONAL TERRITORY***

***26 JUNE 1995***

# CONSTITUTIONAL PRINCIPLES

## THEME COMMITTEE ONE

### BLOCK 9: BRIEFING DOCUMENT

#### AGENDA ITEM 12: NATIONAL TERRITORY

#### 1. INTRODUCTION

1.1 The subject "*national territory*" falls exclusively within the domain of Theme Committee One.

1.2 The suggested framework for this agenda item involves the consideration of the following matters:

1.2.1 Proper definition, also of provincial boundaries.

1.2.2 Limits of territorial waters.

1.2.3 Prince Edward and other islands.

#### 2. TRANSITIONAL PROVISIONS

2.1 The Constitutional Principles which have relevance for the subject matter of this briefing document are the following (including those as per Revised Work Programme p.16, Block 9 but not restricted thereto):

#### I

*"The Constitution of South Africa shall provide for the*

*establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races."*

**XVIII(1)**

*"The powers and functions of the national government and provincial governments and the boundaries of the provinces shall be defined in the Constitution."*

**XVIII(2)**

*"The boundaries of the provinces shall be the same as those established in terms of this Constitution."*

**XVIII(4)**

*"Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a special majority of the legislatures of the provinces, alternatively, if there is such a chamber, a two-thirds majority of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed."*

**XVIII(5)**

*"Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions."*

**XXII**

*"The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces."*

**XXXIV**

- "1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognised way.*
  
- 2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for*

*such a form of self-determination.*

3. *If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions."*

- 2.2 The transitional Constitution of 1993 deals, in one way or another, with the subject matter under discussion and matters associated therewith in the following sections:

**Section 1**

"(1) *The Republic of South Africa shall be one, sovereign state.*

(2) *The national territory of the Republic shall comprise the areas defined in Part 1 of Schedule 1."*

**Schedule 1**

Part 1 of Schedule 1 defines the territories of the nine provinces with reference to districts created in terms of the Magistrate's Court Act, Act No. 32 of 1944, as well as boundary and title deed descriptions.

**Section 61**

*"Bills affecting the boundaries or the exercise or performance of the powers and functions of the provinces shall be deemed not to be passed by Parliament unless passed separately by both Houses and, in the case of a Bill, other than a Bill referred to in section 62, affecting the boundaries or the exercise or performance of the powers or functions of a particular province or provinces only, unless also approved by a majority of the senators of the province or provinces in question in the Senate."*

**Section 62**

*"(1) Subject to subsection (2) and section 74, a Bill amending this Constitution shall, for its passing by Parliament, be required to be adopted at a joint sitting of the national assembly and the Senate by a majority of at least two-thirds of the total number of members of both Houses.*

*(2) No amendment of sections 126 and 144 shall be of any force and effect unless passed separately by both Houses by a majority of at least two-thirds of all the members in each House: Provided that the boundaries and legislative and executive competences of the province shall not be amended without the consent of a relevant provincial legislature."*

**Section 73**

*"(2) For the passing of the new constitutional text by the Constitutional Assembly, a majority of at least two-thirds of all the members of the Constitutional Assembly shall be required: Provided that provisions of such text relating to the boundaries, powers and functions of provinces shall not be considered passed by the Constitutional Assembly unless approved also by a majority of two-thirds of all the members of the Senate."*

**Section 124**

This section establishes the provinces of the Republic and provides that the areas of the respective provinces shall be as defined in Part 1 of Schedule 1: Provided that the establishment of the Northern Cape as a separate province, the establishment in the area of the Eastern Cape of one province, and the inclusion of the areas specified in paragraphs (a) to (f) and (i) to (n) of Part 2 of Schedule 1 within the provinces as defined in Part 1 of Schedule 1, shall be subject to alteration in accordance with the section.

**Section 164**

Subsection (2) identifies as one of the objects of the Commission on Provincial Government to provide the Constitutional Assembly with

advice, including recommendations in the form of draft constitutional provisions, regarding the finalisation of the number and the boundaries of the provinces of the Republic. For the purpose of carrying out its functions the Commission must, *inter alia*, take into consideration historical boundaries, including those set out in Part 1 of Schedule 1, former provincial boundaries, magisterial district boundaries and infra-structures.

**Sections 184A and B**

These sections provide for the establishment of a Volkstaat Council and for the functions of that Council. Section 184B(3) provides as follows:

*"The procedures provided for in this Constitution with regard to the finalisation of provincial boundaries, shall not be construed as precluding the establishment of such a Volkstaat, and in the event of the acceptance of the concept of a Volkstaat, alternative provisions shall be made by an Act of Parliament for the finalisation of the boundaries of any affected province or provinces."*

**Section 6 of the South Africa Act, 1909**

*"The Colonies mentioned in section 4 shall become original provinces of*



*the Union under the names of Cape of Good Hope, Natal, Transvaal, and Orange Free State, as the case may be. The original provinces shall have the same limits as the respective Colonies at the establishment of the Union."*

**Section 1 of the Republic of South Africa Constitution Act, No. 32 of 1961**

This section provided that the Union of South Africa as it existed immediately before the commencement of that Act would become a Republic on 31 May 1961.

**Section 1 of the Republic of South Africa Constitution Act, Act No. 110 of 1983**

This section provided for the continued existence of the Republic of South Africa comprising the four provinces.

3. **CONSIDERATIONS POSSIBLY RELEVANT TO THE TASK OF THEME COMMITTEE ONE**

- 3.1 According to Rautenbach & Malherbe **Constitutional Law** (1994) at 47 defining a national territory can be done in different ways, for example, *"by describing the geographical boundaries, with reference to the existing constitutional entities forming the new state (for example, existing districts,*

*former colonies or states of a federation), or with reference to the territory regarded by the international community as the territory of the new state".*

- 3.2 At 48 the learned authors point out that in the transitional Constitution the national territory is described with reference to the nine provinces which form the Republic which in turn include the former TBVC states which have been re-incorporated into the Republic and the self-governing territories.

*"The territory of each province is defined in a schedule mainly with reference to magisterial districts, but some areas are defined geodetically and also with reference to other statutory provisions and proclamations."*

They confirm that the definition of the territory of the Republic with reference to the provinces follows the pattern which has been followed since the inception of the Union in all previous South African constitutions.

- 3.3 Matters in relation to boundaries of states, the primary subjects of international law, are regulated by international law. **Rautenbach & Malherbe** *op cit* 48 refer to the following salient principles of international law:

- 3.3.1 The territory of a state does not have to be contiguous.

3.3.2 The territory of a state consists of everything under the surface of the defined area as well as the air space above the area as far as it can be controlled by the state of technology.

3.3.3 The state exercises certain powers in respect of its territorial waters.

3.3.4 The expansion and reduction of the territory of the state usually involves the interests of more than one state and can be effected by occupation, annexation, prescription, cession, adjudication and alluviation.

3.4 International boundaries are customarily fixed in one of three ways:

3.4.1 By means of legislation such as Acts of Parliament, decrees, proclamations, etcetera. Sovereign states can effectively create new states and, in the process, new boundaries. Such would be the case when colonies are made independent or new states come into being as a result of secession sanctioned by law.

3.4.2 International boundaries can also come into being as a result of long and uninterrupted use.

3.4.3 Finally, boundaries between states can also be determined in accordance with the provisions of international treaties such as the treaties describing the boundaries between South Africa and Namibia, and South Africa and Lesotho.

3.5 In accordance with section 4 of the Maritime Zones Act, No. 15 of 1994, the sea within a distance of 12 nautical miles from the base lines shall be the territorial waters of the Republic and all law in force in the Republic also applies in its territorial waters and the air space above its territorial waters. There is, however, a right of innocent passage through territorial waters.

3.6 Section 5 of this Act provides that the sea beyond the territorial waters but within a distance of 24 nautical miles from the base lines is the contiguous zone of the Republic. Within the contiguous zone and the air space above it, the Republic has the right to exercise all the powers which may be considered necessary to prevent contravention of any fiscal law or any customs, emigration, immigration or sanitary law and to make such contravention punishable.

3.7 Section 6 provides that the sea beyond the territorial waters referred to in section 4 but within a distance of 24 nautical miles from the base lines shall be the maritime cultural zone of the Republic. In respect of

objects of an archeological or historical nature found in the maritime cultural zone, the Republic has the same rights and powers as it has in respect of its territorial waters.

3.8 According to section 7 the sea beyond the territorial waters referred to in section 4 but within a distance of 200 nautical miles from the base lines, shall be the exclusive economic zone of the Republic. The Republic has, in respect of all natural resources in the exclusive economic zone, the same rights and powers as it has in respect of its territorial waters.

3.9 The continental shelf, as defined in article 76 of the United Nations Convention on the Law of the Sea, 1982, shall, in accordance with section 8 of the Act, be the continental shelf of the Republic. For the purposes of the exploration and exploitation of natural resources as defined in the Law of the Sea Convention and any law relating to the mining of precious stones, metals or minerals, including natural oil, the continental shelf shall be deemed to be unalienated state land.

3.10 The Prince Edward Islands Act, No. 43 of 1948, affords an example where state territory was acquired by occupation and legislation. Section 1 of that Act provides as follows:

*"(1) The territory known as the Prince Edward Islands,*

*consisting of Marion Island ..... and Prince Edward Island ..... is hereby declared to have been annexed to and to form part of the Union of South Africa.*

(2) *For the purposes of the administration of justice, and in general for the application of the laws of the Union, the Territory shall be deemed to be situated within the Magisterial district which includes the City of Cape Town and to form part of the electoral division which includes the harbour of the City of Cape Town."*

3.11 In terms of the Interpretation Act, No. 33 of 1957, "*the Union*" means "*the Republic*".

4. CONCLUSION

The above is an attempt to set the scene for a discussion of item 12. It will be expanded upon orally during the appropriate Orientation Workshop.

